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The Mayor, Commonalty and
Citizens of the City of London,
Governours of the Possessions,
Revenues and Goods of the Hos-
pitals of *Edward VI.* late King
of *England*, of *Christ, Bridewell*,
and *St. Thomas the Apostle*,

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Evan Pugh,
and *Mary* } Respon-
his Wife, } dents.

Appellants.

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The RESPONDENTS CASE.



THE APPELLANTS being, or pretending to be, seized in Fee of a Messuage or Tenement, called the *Bowling-Green House*, with the Appurtenances, and a Bare and a Green thereunto belonging, used for bowling, by their Indenture of Lease dated the 17th of *June*, 1725, demised the Premises, and all Profits, Advantages and Appurtenances thereunto belonging to the RESPONDENTS, from *Michaelmas* then last past, for the Term of 21 Years, at 30*l.* per Annum Rent, clear of all Taxes, Rates and Assessments whatsoever.

The RESPONDENT *Evan Pugh* by the said Lease (*inter alia*) covenanted to keep the said Bare and Green in good Order and Condition, and fit for bowling, and to leave the same at the Expiration of the said Lease, with the rest of the Premises, in good Order and Condition; and that he or his said Wife, would not do or commit, or suffer to be done or committed, any willful Waste, Spoil or Damage in or upon the said Premises; and that if any Part of the said Premises should during the said Term, be digged or broken up for the raising or taking away of Brick-Earth, Sand or Gravel, the said RESPONDENTS should in such Case pay the APPELLANTS, their Successors or Assigns, 100*l.* for every Acre that should be so dug or broken up, and so in Proportion for a greater or lesser Quantity than an Acre.

The RESPONDENTS executed a Counter Part of such Lease, and afterwards the RESPONDENTS in pursuance thereof entred upon the demised Premises, and finding the Bare a great many Feet higher than the Field adjoining to it, which render'd it Cold and Bleak in the *Winter*; which hinder'd several Customers from using the said Bare in the *Winter*; they were advised to be at the Expence to sink the Bare lower, and plant a Fence or Hedge round it to shelter it from the Wind, and accordingly in the Month of *October* 1726, the RESPONDENTS begun to make the said Bare lower by digging up the same.

That the Respondents finding the Soil of the Bare to consist for the most Part of Sand and Gravel, in order to enable them to defray the Expence of sinking such Bare lower, and putting the same in order again for bowling, did contract to sell Part of the Sand and Gravel dug out of the said Bare, in order to make the same lower.

Bill fil'd, 20th
Febr. 1726

The APPELLANTS the 20th of *February* 1726, exhibited their Bill in the High Court of *Chancery* against the RESPONDENTS, thereby praying that the RESPONDENTS might be restrained from breaking up or digging the said Bare, or any other Part of the said Premises, and from committing any Waste or Spoil thereon, and from disposing of, or removing any of the Gravel then remaining on the Premises.

21 Febr. 1726

The APPELLANTS, before the RESPONDENTS were served with any Process to appear to, and answer such Bill, obtained an Order of the said Court made *ex Parte*, for an Injunction to stay the RESPONDENTS, their Servants, Workmen and Agents, from breaking up, or digging the said Bare, and from committing any Waste on the Premises, and from removing or disposing of the Gravel then dug on the Premises, until the RESPONDENTS should have answered the said Bill, and the said Court should take other Order to the contrary, which Injunction issued accordingly.

Answer, 6th

March, 1726

The 6th of *March*, 1726, the RESPONDENTS put in their Answer to the said Bill, and thereby (*inter alia*) set forth the said Reasons for their altering and lowering the said Bare as is before mentioned, and insisted on their Right of digging up the said Bare on Payment of 100*l.* per Acre, and undertaking to make the said Bare in a better Condition than the same was before the digging up the same, and so to leave the same at the End of the said Term.

That the RESPONDENTS having obtained an Order upon coming in of their Answer, to dissolve the said Injunction, unless the APPELLANTS should shew Cause to the contrary,

Order, 14th

March, 1726

The 14th of *March* 1726, when the APPELLANTS came to shew Cause why the said Injunction should not be dissolved, the Lord Chancellor, on hearing of Counsel on both sides, disallow'd the Cause shew'd, and ordered that the said Injunction should be dissolved; the RESPONDENTS consenting

it

If the APPELLANTS should bring an Action of Debt or Trover to plead thereto, so that the same might be tried the then next Term.

From which last mentioned Order the APPELLANTS have appealed, and insist on the following Objection, stated in their Petition of Appeal.

Objection.

For that the APPELLANTS insist, That the RESPONDENTS being Tenants for Years, had no Right to commit Waste, and were also by an express Covenant in the said Lease restrained from committing any willful Waste in the said Bare and Green, and that the Covenant whereby the RESPONDENTS agreed to pay the APPELLANTS after the Rate of 100 l. per Acre, for such Part as they should dig or break up, for raising of Gravel, Sand or Brick-Earth, ought not to be construed as a Licence for so doing, but ought to be taken as a Penalty the more effectually to restrain the RESPONDENTS from the Commission of Waste, and that therefore the said Injunction ought to have been continued till the Hearing of the said Cause; for that otherwise the RESPONDENTS would in the mean time dig up the Premises, and the APPELLANTS be without Remedy.

Answer 1.

To which Objection the RESPONDENTS answer, That the 100 l. per Acre required to be paid for every Acre of the said Premises which should be dug or broken up, was not intended as a Penalty, but as a Satisfaction and Recompence for such part of the Premises as should be dug or broken up during the said Term; and that such digging and breaking up the said Premises ought not to be deemed committing any Waste.

2. That the RESPONDENTS humbly insist, That in Case the APPELLANTS conceive themselves to be aggrieved by the RESPONDENTS digging up the said Premises, they may have their Remedy at Law against the RESPONDENTS by Action of Trover or other Action; and that there is no Reason for a Court of Equity to interpose, by granting any Injunction to restrain the RESPONDENTS from digging up the said Bare, especially since the digging in the manner aforesaid is manifestly for the Improvement thereof.

Wherefore, and for divers other Reasons, the Respondents humbly insist, That the said Order of the 14th of March 1726, is just and reasonable, and according to the Rules of Equity, and pray that the same may be affirmed by your Lordships, and the said Appeal be dismissed with Costs.

P. YORKE,
J. BROWNE.

Ordered That the Ord.ⁿ of the 14th of March 1726. complained of be Discharged and that the Court of Chancery do Grant an Injunction till the Hearing of the Cause.

The Mayor, Commonalty
and Citizens of the City
of London, Governours of
Christ, Bridewell, and St.
Thomas's Hospitals,
APPELLANTS.

Evan Pugh, & Mary his Wife,
RESPONDENTS.

THE
Respondents CASE

To be heard at the Bar of the
House of Lords, the 20th
Day of month 1727